In the Supreme Court of the United States.

OCTOBER TERM, 1924. NO. 661.

Pennsylvania Railroad System and Allied Lines Federation No. 90, Executive Council of Pennsylvania Railroad System and Allied Lines Federation No. 90, et al., *Appellants,*

vs.

The Pennsylvania Railroad Company, Samuel Rea, W. W. Atterbury, Elisha Lee, George L. Peck, E. T. Whiter, C. S. Krick, M. W. Clement, T. B. Hamilton, Benjamin McKeen, I. W. Geer, P. F. Smith, Jr., T. H. Davis, W. J. Hilton, Charles Mode, J. E. Cavey and C. G. Larson, Appellees.

BRIEF FOR APPELLEES.

The Enforcement of Title III of the Transportation Act is the Basis of the Bill.

The appellants begin their argument by the assertion on page 45 of their Brief: "At the outset it should be noted that this is not an action to enforce a decision of the Railroad Labor Board, but one to enjoin the violation of an express statutory provision," and on page 49 that "the defendants have violated, are violating and threaten

to continue violating a positive statutory law, *i. e.* the Transportation Act of 1920." Thus it appears that the enforcement of Title III, Sections 301 and 302, of the Transportation Act is the basis of the complainants' Bill, the prayers therein and the argument in support thereof.

The distinction attempted to be made throughout the Brief for the appellants between a general policy or practice deduced from the Transportation Act, and the remedies, powers and rights therein created, is unsubstantial and affords no basis, it is submitted, for any of the relief prayed for in the Bill. All of those prayers must in their last analysis be referred to the express provisions of the statute, and no relief can be sustained based upon any other ground, and particularly upon conceptions of the policy of the Act not expressed therein and indicated only in congressional discussion or by suggestions of the benefits of the enforcement of a method of mandatory control between employer carriers and employees, had the Act been in different terms and provided other methods for its administration. As stated by Justice Holmes in Pine Hill Co. *vs.* United States, 259 U. S. 191, 196: "It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage."

The differences between the carrier and its employees which are made the prime subject of the Bill and of the argument upon the several propositions advanced by the appellants, arose from the question as to the obligation of the carrier to accept as representatives of the employees, for the purposes of conference under the provisions of the Transportation Act, certain labor organizations then constituted of its employees, and the election and action of individuals duly chosen as representatives of the employees with whom binding and legal agreements with reference to rules, regulations and wages were made (Record, page 157). The action of the carrier complained of, was that it declined to accede to and be bound by decision No. 218 of the Labor Board directing that the ballots

should contain the names of labor organizations as representatives. The propriety of its action in this respect has been the subject of consideration in certain cases arising in the District Court for the Eastern District of Pennsylvania, (Fenstemacher *vs.* Pennsylvania Railroad Co., 296 Fed. 213; Brotherhood of Railway &c. Employees *vs.* Pennsylvania Railroad Co., 296 Fed. 218), and in this case was definitely, clearly and finally decided by this Court in The Pennsylvania Railroad Company *vs.* United States Labor Board, 261 U. S. 72.

The application of the complainant in that case was that the Labor Board be restrained from publishing under Section 313 of Title III of the Transportation Act that the Railroad Company had violated the Board's decision under that Act known as decision No. 218. The only power given the Labor Board for violation of any decision made by it is to make public its decision. (Transportation Act, Title III, Sec. 313). Upon this question this Court said (page 79):—

> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subject by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

This Court then discussed fully the question of who were the proper representatives of the employees, saying (page 84):—

> "The counsel for the Company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which cannot be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and it is not within the right of the Company to restrict them in their selection to employees of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed."

The Court then discussed the provision under Title III for action by the Board and continues (page 84):—

> "The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the Act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision. * * * The statute does not require the Railroad Company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision."

So far, therefore, as the appellants rest their Bill upon the allegation that the Company and its officers could not deal with the representatives of the employees

chosen in the manner set out in the Bill, it is established, it is clear, that there is no basis upon which such allegation can be sustained, this Court by the decision above cited having definitely ruled to the contrary.

Section 312 of the Transportation Act is as follows:—

> "Sec. 312. Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 A. M. March 1, 1920. * * *"

The wages in effect on March 1st, 1920, were fixed by the National Agreement and could not be decreased prior to September 1st, 1920. (Sec. 312 of the Transportation Act, *supra*). Between March 1st, 1920, when Federal Control ended, and April 15th, 1920, when the Labor Board was organized, many conferences were held between the heads of labor organizations, signatories to the National Agreement, and the carriers, but such conferences were not successful. The Labor Board after its organization on April 15th, 1920, proceeded to deal with these disputes and by decision No. 2 rendered on July 20th, 1920, increased the wages of the employees of the classes described in the Bill 13 cents per hour (Record, page 33), but postponed decision upon the dispute on rules and working conditions until April 14th, 1921, when by its decision No. 119 (Record, page 41) it continued the existing rules until July 1st, 1921. The Labor Board also declared by its decision of July 20th, 1920, that no changes should be made in the rules, working conditions and agreements in force under the authority of the United States Railroad Administration "except by agreement between the carrier and employees concerned" (Record, page 36) and by de-

cision No. 119 directed that officers and Labor organizations should designate representatives to confer together. (Record, page 44). Representatives of the Company and of Federation No. 90 met in Philadelphia on May 24th, 1921, with a view to composing their differences, but failed to agree upon a form of ballot to be sent out to the employees, and it was this difference which started the controversy between the parties. Thus all of the preliminary steps leading up to a final decision of the Labor Board were taken. The conference was held and the parties disagreed, and these constituted all of the necessary preliminary steps required by Title III of the Transportation Act. These facts are clearly found in the opinion of the Circuit Court of Appeals. (Record, pages 493, 494, 495).

After the conference of May 24th, 1921, the Company and Federation No. 90, held elections for representatives, each using its own form of ballot (Record, pages 196, 203), after which the Company entered into agreements with the representatives of its employees fixing their wages effective July 1st, 1921.

The Appellants again brought the matter before the Labor Board which on July 26th, 1921, decided (Decision 218, Record, page 71) that the elections were illegal and directed that new elections should be held, prescribing the form of ballot which permitted the elections of Labor Organization representatives, which decision the Company declined to recognize, and in which course it has been supported by the decisions of this Court.

The claims for compensation for damages or wages as stated in the bill, (Record, pages 87, 88, 96, 97) and as summarized by the Circuit Court of Appeals in its Opinion (Record, page 496) are:—

First:—By certain employees who being on furlough refused when they were notified, to return to work on the scale of wages effective July 1st, 1921, for damages in the amount for wages they would have received had they been employed on the old scale of wages. (Record, pages 162, 218, 226.)

Second:—By certain employees who worked under the scale effective July 1st, 1921, from that date to July 1st, 1922, and then went on strike and left the service of the Company for an amount equal for that period to the difference between the wages on the old scale and those established by the new scale. (Record, page 249.)

Third:—By certain employees who have continued to work under the wages established July 1st, 1921, for an amount equal to the difference between the wages on the old scale and those on the new scale from July 1st, 1921, to the date of the filing of the bill.

There are thus two kinds of claims, one for damages for failure to receive wages for work which was not done and the other for higher wages than those agreed upon and accepted by the claimants.

The latter is stated to be for $6,000,000 (Record, pages 87, 88); the former is estimated at a much larger sum.

As to the claims of former employees who refused to work no right to damages can arise unless there was an enforcible contract with them to continue them in the service of the Company, and there is no evidence of such a contract; and in any case as to them and as to the former employees and employees who seek to recover the difference between the wages received by them and those formerly paid, they must establish that the latter are still in force. It has already been shown that this Court has held that the decisions of the Labor Board are not enforcible by process, therefore, the Company cannot be compelled to pay the scale of wages established by the decision of the Board of June 1st, 1921, which was lawfully altered by the agreement between the carrier and the representatives of the employees, effective July 1st, 1921. Upon this subject the District Court said (Record, page 269):—

> "The view we take is, as already expressed in several different forms, that the only rights or duties we can consider are the legal rights or legal duties of the parties. These arise in this case wholly out of contracts. The National Agreement and the

modification by the Labor Board which followed it, having been accepted and followed by the defendants, there would be an implied contract, on its part, to pay its several employees accordingly. There was no agreement to continue these payments for any length of time. When, therefore, the defendants refused to continue the payments and announced that it would not thereafter pay them, but that payments would be on another and different basis, and since that time it has so paid them, and the individual employees have accepted the payments, we cannot find that there was a contract or is any legal obligation of the defendant Company to pay more."

The Defendants have not Violated any Provision of the Transportation Act of 1920.

Appellants' contention at page 49, *et seq.*, of their Brief is that defendants have violated, are violating and threaten to continue violating a positive statutory law, *i. e.*, the Transportation Act of 1920. It is conceded by appellants that the Courts cannot enforce a decision of the Labor Board (Appellants' Brief, page 58) by reason of the decision of this Court to that effect in *The P. R. R. Co.* vs. *U. S. Labor Board*, 261 U. S. 72, but the argument is made that Section 301 of the Transportation Act, making it the duty of all carriers to confer with their employees' representatives, is mandatory and may be enforced by the courts. There are two answers to this contention: First, that the Company did confer with Federation No. 90 and failed to agree, as pointed out *supra*, and Second, that the Statute does not require the Company to confer with Federation No. 90 as shown by the following language of this Court in *The P. R. R. Co.* vs. *Labor Board*, *supra*, at page 85:—

"The statute does not require the railway company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees."

And as stated in the opinion of the Circuit Court of Appeals (Record, page 498) as follows:—

> "A right of employer or employees to insist that the other proceed to a hearing pursuant to such rules as the Labor Board may have prescribed is not conferred upon either party to a dispute unless the statute makes it compulsory upon them. If compulsory, and if, as in this instance, the employer should refuse to obey the rules which the Labor Board has prescribed for an election of representatives and otherwise should fail to submit itself to the Labor Board, then by implication the statute might raise a right in the employees to have the dispute heard in the manner the Labor Board has provided and, conceivably, they might obtain enforcement of that right by legal process. But we find nothing in the statute which makes it compulsory upon the employer to confer with the representatives of the employees or further to contest the matter before the Labor Board."

The Clayton Act Expressly Forbids an Injunction.

The theory of appellants' case is that this is a dispute between a carrier employer and its employees, involving wages and working conditions and that Section 301 of the Transportation Act imposes a mandatory duty on the carrier to confer with its employees' representatives on any such dispute. On this theory appellants base their prayer for an injunction. The prayers of the bill are, *inter alia*, that an injunction be issued restraining the defendants from (1) continuing the new wage scale, (2) recognizing the representatives elected by the employees and (3) refusing to recognize, confer and deal with System Federation No. 90 as representative of the Company's employees. The appellants ignore the fact that Congress by Section 20 of the Clayton Act (Act of October 15th, 1914, Chapter 323, 6 Fed. Stat. Ann.

2nd Ed., page 141), expressly prohibited any restraining order or injunction in such a dispute between employer and employees. This section of the Clayton Act has been held to apply to disputes between an interstate carrier and its employees (Foss, *et al., vs.* Portland Terminal Co., 287 Fed. 33; Michaelson *vs.* United States, 45 Sup. Ct. Rep. 18) where an application for an injunction against striking employees is made, and there seems to be no reason why it should not apply also where the situation, as here, is reversed, and the striking employees seek to enjoin the employer.

There is no Conspiracy by or Among the Defendants.

Appellants' Point II, discussed at page 84, *et seq.*, of their Brief is that the acts of defendants set forth in the Bill of Complaint constitute a conspiracy.

The charge and allegation of conspiracy is founded upon the action of the carrier defendant wherein it conducted an election for representatives and created the rules, regulations and wages in conference between them and the representatives of the carrier. Unless the carrier was bound to obey decision 218 and permit the election of the complainant organization as a representative of the employes, and confer with and deal with it, the agreements made with the representatives chosen as described were valid and binding. Therefore the action of the defendants could under no circumstances be described as a conspiracy.

The charge of conspiracy is based upon the assumption that what defendants have done is unlawful. If this basis is removed the entire conspiracy theory collapses. As has been pointed out above, this Court has definitely ruled that the Transportation Act does not forbid the acts which defendants have done. Since appellants have failed to establish that the acts of defendants were unlawful there can be no unlawful conspiracy to commit them. This reasoning applies both to the contention that defendants are guilty of a common law

conspiracy and also to the contention that they have violated Section 19 of the Criminal Code, quoted at page 85 of Appellants' Brief. This was pointed out by the Circuit Court of Appeals at the conclusion of its opinion. (Record, page 498.)

The Acts of Defendants do not Violate Complainants' Civil and Statutory Rights, Neither do they Endanger and Oppress them in the Free Exercise of Such Rights.

Point III of appellants, set forth at page 88 of their Brief, is that the acts of defendants violate the complainants' civil and statutory rights and oppress them in the free exercise and enjoyment of such rights. This is also based on the assumption that the acts of defendants are unlawful and lacking this basis is without foundation, and is answered most convincingly by the Circuit Court of Appeals in that part of its opinion beginning at page 497, of the Record, as follows:—

> "We do not understand just what the complainants mean by their 'civil' rights. If they mean such as are accorded labor by general law,—the right lawfully to organize, *United Mine Workers* vs. *Coronado Coal Co.*, 259 U. S. 344, the right to bargain collectively, the right to strike,—no invasion of such rights is shown and, accordingly, none is here in question. Moreover, the complainants have expressly grounded their actions on the Transportation Act of 1920 and, limiting their grievance against the respondents to their refusal to observe its terms, they have asserted that the conduct of the respondents is in violation of rights granted them by that Act in declaring a national policy in respect to railroad labor disputes. Thus both the pleadings and the facts show that complainants stand on their statutory rights. To these alone we shall address discussion."

As Complainants Have Failed to Show any Violation of their Legal Rights they Cannot Recover the Pecuniary Losses and Other Damages Alleged to Have Been Sustained by Them.

The contention of the individual complainants is that they have sustained and are sustaining pecuniary losses and other damages by reason of defendants' unlawful acts for which they have no adequate remedy at law. As in the preceding points, this point is founded on the proposition that defendants' acts were unlawful. It having been indicated *supra*, that defendants' acts were not unlawful it follows that there was no violation of complainants' legal rights and therefore, even if they did, in fact, sustain pecuniary losses and other damages, they cannot recover therefor. But again in any case neither can those who voluntarily quit work recover wages they have not worked for, nor can those who voluntarily work for wages agreed upon and accepted by them recover on the basis of higher wages.

Complainants are not Proper Parties to Maintain this Suit.

Complainants' Bill avers, paragraph 1 (Record, page 5), "Pennsylvania Railroad System and Allied Lines Federation No. 90, hereinafter for convenience called 'System Federation No. 90,' is a voluntary unincorporated association of employees of the Pennsylvania Railroad Company." Paragraph 3 (Record, page 9) avers: "The action is of a civil nature and involves the duty of railroad companies and other carriers to confer in good faith with their employees through authorized representatives designated by the latter on all questions and disputes arising between them with respect to wages, rules and working conditions." Paragraph 4 (Record, page 11) avers that action of the Board may be taken on its own motion or may be invoked by the Chief Executive of the carrier, or an "organization of the employees." The Bill thereafter avers that at the time of the passage of the Transportation Act System Federation No. 90 was a generally

recognized organization of employees within the meaning and intent of the Act, and was authorized by such employees to represent them for all purposes thereof, and that up to and including the first part of the year 1921 the said organization continued to be an organization of employees of the Railroad Company. The Bill herein was filed on the second day of November, 1923. The Answer thereto, filed December 14, 1923, specifically averred that the complainants had no authority or legal power to file the Bill.

If under Sections 301 and 302 of Title III of the Transportation Act organizations of employees of a carrier may represent its employees in any dispute between the carrier and the employees, that right is limited to such organizations as are composed of employees of the carrier. At the time of the filing of the Bill and for more than a year prior thereto, to wit, since July 1st, 1922, at which time the employees, members of Federation No. 90, voluntarily left the service of the Railroad Company, the carrier, on a strike, it appears from the testimony of Newton P. Good that there were no employees of the Railroad Company members of that organization (Record, pages 154, 162, 163).

This testimony shows that the complainant Federation was not at the time of the filing of the Bill an organization of employees of the Railroad Company, and therefore it had no authority or power to file the Bill with reference to any dispute between employees of the carrier and the carrier under Title III of the Transportation Act, or otherwise, unless the Bill can be maintained as an action to recover an alleged balance due for wages to the employees, which is denied and is fully discussed elsewhere in this Brief.

Even if the Individual Complainants Have any Right of Action to Recover for Damages or Wages, their Remedy is by an Action at Law and not in Equity.

No authorities are cited by appellants to support their contention that they have no adequate remedy at law to recover for their alleged losses, and to overcome the

well settled rule of law that when the damages are definite and liquidated no equitable accounting will be allowed. The Circuit Court of Appeals for the Eighth Circuit discussed this question in the case of *Thomas* vs. *Council Bluffs Canning Co.*, 92 Fed. 422, saying at page 423:—

> "There is, indeed, a prayer for an accounting; but it is a futile prayer, for no accounting is necessary, and none could be had, because the amount which the Council Bluffs Company owes is written in the contract, and the amount which each stockholder is entitled to recover is measured by the number of shares of the original stock which he owns. The amount each stockholder is entitled to receive is not even an unliquidated amount."

All of the cases cited on pages 115 and 116 of Appellants' Brief as bearing out the right to recover wages in this action, are suits at law and not in equity.

On page 47 of Appellants' Brief the contention is made that the causes of action for damages are properly joined in the equitable suit for injunction because they flow directly from defendants' alleged unlawful acts and the main suit being in equity, the Court should pass upon all phases of the controversy and make a complete determination of the rights of the parties, including the award of money damages as an incidental relief, and also because an adjudication of the damage claims will prevent multiplicity of suits. In other words, the contention is made that equity will take jurisdiction over damage claims as incidental to the prayer for injunction, and also because by so doing it will avert a multiplicity of suits. It has already been shown that the allegations in the Bill and the proof in support thereof fail to establish any right to an injunction, and therefore, no jurisdiction over the damage claims could be assumed as incidental to an injunction. Nor can the jurisdiction be sustained, as asserted on page 47 of Appellants' Brief

on the ground of avoidance of a multiplicity of suits. *Equitable Life Assurance Society* vs. *Brown*, 213 U. S. 25; *Thomas* vs. *Council Bluffs Canning Co.*, 92 Fed. 422.

The appellees therefore submit:—

First.—That no ground is laid or established for an injunction against the defendants below upon the ground of conspiracy or upon any other ground.

Second.—That there is no basis for the charge of conspiracy.

Third.—That the complainant, System Federation No. 90, is not a representative of the employees of the defendant carrier, and may not therefore maintain this Bill.

Fourth.—That the individual complainants are not entitled to recover any damages, wages or balance of wages claimed by them.

And finally, that all the allegations of the complainants' Bill and all the relief prayed thereunder depend upon the validity and propriety of the election of the representatives of the employees with whom the rules and regulations in force were duly agreed upon, and therefore that the action of the Court below dismissing the Bill was correct and its order should be sustained.

JOHN HAMPTON BARNES,
For Appellees.